IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 519 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SUPERINTENDENT OF POLICE CENTRAL BUREAU OF INVESTGATION

Versus

VIKRAM R PALKHIWALA

Appearance:

MR AMIT J SHAH for Petitioner

MR MA PAREKH for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 19/10/2000

ORAL JUDGEMENT

1. This revision has been filed by Superintendent of Police, C.B.I., Special Investigation Unit, Government of India, challenging the order dated 3.8.1999 of Special Judge, Ahmedabad, allowing the application of the

respondent who is accused No.1 and closing the prosecution evidence and giving a date for recording the statement of the accused.

2. Shri Amit J. Shah, learned Counsel for the revisionist and Shri M.A.Parekh, learned Counsel for the respondents have been heard.

3. Brief facts giving rise to this Revision are as under :

The revisionist was prosecuting the respondent No.1 and another accused u/s.120(B), 420, 467, 468, 477-A of the Indian Penal Code and also u/s.5(2) of the Prevention of Corruption Act, 1988. The charges were framed against both the accused on 7.1.1987. Both the accused pleaded not guilty. The prosecution evidence commenced on 12.5.1987. It is informed that thereafter as many as about 55 prosecution witnesses were examined, but subsequently for one reason or the other enumerated in the impugned order remaining witnesses could not be examined. The respondent No.1, who is accused No.1 in the trial, under these circumstances, moved an application for closure of prosecution evidence. In the impugned order the learned Special Judge has quoted from the order sheet as to how many adjournments were granted on the motion of the prosecution agency. It was observed by the learned Special Judge that it was a case of gross negligence on the part of the prosecuting agency in not examining the remaining witnesses and since the trial was being prolonged it amounted to violation of fundamental right of speedy trial as has been emerging from Article 21 of the Constitution of India in view of various pronouncements of the Apex Court. The said Application was allowed hence this revision.

4. Shri M.A.Parekh, learned Counsel for the respondent has contended that the revision is not maintainable and that the proper course for the prosecution was to move an application before the Special Judge u/s. 311 of the Cr.P.C. I, however, do not find much force in this preliminary objection. Section 311 Cr.P.C. provides that any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and reexamine any person already examined and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case.

5. As against this the impugned order is certainly a final order in the sense that it has deprived the prosecution of examining and producing other witnesses other than 55 who have already been examined. The right of the prosecution to produce entire evidence has therefore been taken away through the impugned order and in this way the impugned order has terminated the proceeding resulting in finality of the impugned order. Consequently such order is revisable and Section 397(2) Cr.P.C. is no bar to the maintainability of the revision. If the order is revisable and is not an interlocutory order but is a final order the revision cannot be dismissed as not maintainable.

6. The next contention of Shri Parekh has been that on special facts and circumstances of the case the impugned order cannot be said to be illegal inasmuch as from the impugned order it appears that enough opportunity was granted to the prosecution to produce evidence and the counsel for the revisionist in the trial Court was ready to cross examine the prosecution witnesses even during the period the accused No.1, namely, the respondent, was not present. On the face of it the argument sounds well, but on scrutiny it is difficult to accept it. It is true that the charges were framed on 7.1.1987 and for a period of about 12 - 1/2 years the trial could not be completed when the impugned order was passed on 3.8.1999, but if the history as noted in the impugned order is considered it appears that the prosecution was not solely responsible for the protracted trial. The charges were framed on 7.1.1987. The prosecution witnesses were proposed to be examined and the first witness was examined on 12.5.1987. Other witnesses were also examined and inasmuch as 55 witnesses were examined. Consequently, it cannot be said that the prosecuting agency was interested only in prolonging the trial and not examining the witnesses. It is true that the fundamental right of accused for speedy trial has to be safeguarded but at the same time in a sensitive trial where the prevention of Corruption Act is involved the prosecution evidence cannot be permitted to be closed simply because there was some negligence on the part of the prosecuting agency. The trial Court itself has admitted that 55 witnesses were examined by the prosecution which is mentioned at page : 3 of the impugned order. It is also mentioned in the impugned order that the accused No.2 used to remain absent on various adjourned dates and warrants were also issued, but it could not be served. Proclamation was issued u/s.82 and 83 Cr.P.C. against the accused No.2 on or about 6.11.1998. He was declared absconding on

16.4.1998. The trial of accused No.2 was not seperated in the mean time. Consequently if the proceedings in the trial were held up during the period accused No.2 remained absconding and was declared absconding on 16.4.1998 the same has to be excluded and it cannot be said that in this period the prosecution was wholly blame worthy. If accused No.2 was declared absconding only on 16.4.1998 then various dates on which Special P.P. remained absent and sought adjournments till 28.11.1997, could not be a ground for blaming the prosecution. Even if Special P.P. would have been present on those dates the case could not be proceeded because accused No.2 was absconding and his trial was not seperated. It further flows from the impugned order that at one stage the counsel for accused No.2 made a request that he was ready to conduct the case in absence of his client and that since other witnesses were not present the case had to be adjourned. If accused No.2 was not available and he was absconding the trial could not be completed inspite of willingness of his Advocate to cross examine the remaining witnesses. The statement of accused No.2 u/s.313 Cr.P.C. could not be recorded in his absence. Warrants were issued against accused No.2, but the same could not be served till 16.6.1998. Thereafter also it could not be served on 29.9.1998. Proclamation was issued against accused No.2 on 16.11.1998 and on 16.4.1999 accused No.2 was declared absconding. On 17.6.1999 no witness was present, but still in the absence of absconding accused, and without seperating his trial, the trial against the respondent could not have proceeded. On 25.6.1999 Special P.P. sought adjournment on the ground that witnesses were not available and on 26.7.1999 application was moved by the respondent No.1 for closing the evidence. From the above cronological history of the case it is clear that it is not correct to say that the prosecuting agency was solely responsible for delay in completion of trial. It was mainly on account of absence of accused No.2 who went abroad with the permission of the Court, but subsequently remained absconding that the trial could not be expeditiously concluded.

7. The trial Judge has closed the evidence, but has not referred to the relevant Apex Court's Judgment on the point. He has taken shelter behind Section 309 Cr.P.C. for closing the prosecution evidence, but on the facts and circumstances of the case aid of Section 309 could not be taken.

8. It is true that the fundamental right of the accused for speedy trial as floowing from Article 21 of

the Constitution of India has to be safeguarded, but at the same time various Apex Court's verdict have also to be taken into consideration whether in such cases the prosecution evidence could be closed and closure of prosecution evidence on such facts and circumstances of the case is permissible. The Apex Court in first common cause case, a Registered Society v/s. Union of India, reported in (1996) 4 SCC 33, and thereafter from time to time has laid down the guidelines as to how the delay in trial has to be curtailed and how the right of accused for speedy trial under Article 21 of the Constitution has to be protected. However, when difficulties arose supplementary guidelines were issued by the Apex Court in second common cause case (1996) 6 S.C.C. 775, Rajdeo Sharma v/s. State of Bihar (1998) 7 SCC 507 and Raj Deo Sharma v/s. State of Bihar, JT 1997 (7) SC 317. In the first common case v/s. Union of India, reported in 1996 (4) SCC 33, guideline No.4 assumes significance in cases involving Corruption. Guideline No.4 inter-alia provides that the direction 1 & 2 made hereinabove shall not apply to cases of offences involving Corruption cases, etc. If this is the guideline of the Apex Court then the balance has to be struck between fundamental right of the accused under Article 21 of the Constitution of India as well as between Guldeine No.4 in the first common cause case and as such in cases where the offences involving corruption are registered against the accused fundamental right under Article 21 to some extent has to pave way for effective trial of such offences. However, that does not mean that the prosecution has liberty to prolong the trial for any number of years as it desires. In the case before me the trial is pending since 7.1.1987 when the charges were framed and a period of 13 years is not less period. However, Shri Shah pointed out that because there are only two Courts for dealing with such cases in Gujarat State, pendency of large number of cases is partly a ground for delay in disposal of such cases. In my opinion the impugned order is contrary to guideline No.4 of common case No.1 (supra) hence the impugned order is illegal and is liable to be set aside.

9. The Revision, therefore, succeeds and is hereby allowed. The impugned order is set aside. The Special Judge, Ahmedabad, is directed to proceed to record the statements of remaining prosecution witnesses on day to day basis till the trial is over. This exercise shall be done with effect from 15.11.2000, and Special Judge will see that on no ground whatsoever and in no case on the request of the C.B.I. adjournment shall be granted. It shall be the duty of the C.B.I. to procure attendance of the remaining prosecution witnesses through the agency of

the Court during this period. The trial shall be conducted and completed as expeditiously as possible after its commencement with effect from 15.11.2000.

Direct service permitted.

sd/-

Date : October 19, 2000 (D. C. Srivastava, J.)

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